Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE ACCREDITATION BOARD FOR ENGINEERING AND TECHNOLOGY INC., IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL D. BROWN
Attorney for
The Accreditation Board for Engineering and Technology, Inc.
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

HOWARD B. PREBANT
STEIN SIMPSON ROSEN & OHRENSTEIN
1370 Avenue of the Americas
New York, New York 10019

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of the Case 3

The Facts 4

Reasons for Granting the Writ 4

POINT ONE—

The Decision Below Creates a Rule of Law That Is Against Long Established Public Policy and Will Have a Disastrous Effect on Non-Profit, Voluntary Membership Organizations 5

CONCLUSION 9

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE ACCREDITATION BOARD FOR ENGINEERING AND TECHNOLOGY INC., IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

The Accreditation Board for Engineering and Technology, Inc. ("ABET") is a forty-eight year old not-for-profit corporation organized and operated exclusively for scientific educational and charitable activities in the public interest. During the course of its existence, ABET (and its predecessor organizations) has served the public by assisting in the evaluation and development of better educational programs for the engineer, engineering technologist and engineering technician in the colleges and universities of this country. ABET is recognized by the U.S. Commissioner of Education and the Counsel on Post-Secondary Education as the sole agency responsible for the accredita-

tion of educational programs leading to degrees in engineering. ABET accreditation is accepted by the National Bureau of Engineering Registration, the National Counsel of Engineering Examiners and by virtually all of the state licensing boards.

The scope and significance of ABET's activities can readily be seen from the fact that over the past three years ABET engineering accreditation volunteer teams visited, reviewed, studied, commented upon and accredited one hundred sixty-nine schools and six hundred eighty-three engineering programs. Further, the volunteer teams formally reported on one hundred forty-seven schools and programs. In the same period, ABET's technology accreditation volunteer teams* visited, studied, and evaluated one hundred sixty-three schools and five hundred thirty-three programs and formally reported on one hundred seven schools and programs. All of these activities were accomplished through the efforts of volunteers.

Based upon the investigation, analysis and expertise of these volunteers, ABET was able to provide invaluable assistance and direction to engineering and technological institutions in developing curricula and other educational programs to advance the art and science of engineering and to enable the educational institutions of this country to maintain a high level of quality in engineering and technological education with a view towards the promotion of the public welfare through the development of a better educated engineer, engineering technologist, and engineering technician.

---

* Because of the difference in courses leading to an engineering degree and those leading to the graduation of technicians and technologists, two categories of review teams have been developed with appropriate criteria for accrediting the respective programs.

ABET has been fortunate in the past forty-eight years of its existence to be able to rely upon volunteers for virtually all of its activities. If it were not for these volunteers, ABET's programs, if carried out at all, could only be done at great cost for if ABET were required to purchase services comparable to the talents and abilities of the ABET volunteers the cost would indeed be staggering.

Unfortunately, through its decision in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers**, the United States Court of Appeals for the Second Circuit has, by its failure to define with precision the extent to which a charitable organization may, if at all, be responsible for the unauthorized and unrelated acts of its volunteers, threatened the future of the volunteer programs of ABET and those of other non-profit scientific, educational and charitable organizations providing important services to the public.

Statement of the Case

The question presented by the instant Petition is whether, or to what extent, a not-for-profit charitable corporation may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of volunteers who, totally unbeknownst to such corporation, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has created uncertainty and confusion as its ruling is entirely inconsistent with prior decisions of this Court, other circuits, and with the long established public policy

* Docket Nos. 79-7254 and 79-7260, decided November 24, 1980.

of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted to address this important issue of public policy.

The Facts

The facts of this case have been presented at length in ASME's Petition and are adopted for the purposes of this brief.

Reasons for Granting the Writ

If the confusion created by the decision below is left to stand, many, if not all, of the services of not-for-profit corporations, which of necessity rely upon the work of volunteers for the quality and scope of their activities, will be severely reduced, if not permanently discontinued. The lack of precision with which the lower court has defined the standard of care to which a charitable organization will be held for the unauthorized acts of its volunteers will create a situation in which volunteers can act only under the most stringent and restrictive of conditions, which would discourage volunteers from offering their services and severely restrict and limit the activities of these charitable organizations which have, for half a century, served the public interest.

POINT ONE

The Decision Below Creates a Rule of Law That Is Against Long Established Public Policy and Will Have a Disastrous Effect on Non-Profit, Voluntary Membership Organizations.

The decision of the Second Circuit has created new uncertainties in the concept of vicarious liability under the antitrust laws. In imposing liability on the non-profit corporate principal, the lower court seemed to base the imposition of liability not only on the act of an agent acting under "apparent authority", but also on the absence of a "suitable precaution to avoid the antitrust violations." * However, by imposing such liability on this rationale, the lower court has apparently disregarded the principle established by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents ". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U.S. 344, 395 (1922).

Indeed, in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve

---

* Opinion of Court of Appeals in *Hydrolevel Corporation* v. *ASME,* Petition of ASME at A-15.

large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation of basic policy decisions over an extended period of time. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By overlaying the existing rule of vicarious liability with a theory of "apparent authority" to cover unrelated acts of agents, the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal, supra,* but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very essence as a not-for-profit § 501(c)(3) tax exempt corporation is predicated upon the performance of scientific, educational and charitable services *in the public interest.* In sharp contrast to the decision in *Hilton Hotels, supra,* where the Ninth Circuit recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

The wisdom in restricting the imposition of corporate liability to acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is readily demonstrated by the compatibility of such principals with the long established policy

---

* Indeed, in holding the Hilton Hotel Corporation liable for the act of its agent, the Ninth Circuit specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962).

In the instant case, it is conceded that the volunteer-agents had no intention of benefiting ASME and, in fact, did not benefit ASME by their acts.

of encouraging the work of not-for-profit membership corporations. While the very nature of these organizations compels them to rely on the work of volunteers, it has also allowed them to perform important high quality public services at no cost to the public. Indeed, the services provided to society by non-profit membership corporations are simply too many to enumerate in this brief. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions. The contributions of non-profit membership corporations, however, go much beyond the engineering societies—bar associations, medical associations, accountants' organizations and community planning boards, to name just a few, have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in the dissemination of information, improving public safety, product reliability, and maintaining high educational standards for the colleges and universities of this country.

If ABET, its member societies and other non-profit organizations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or sharply restricting the activities of their volunteers, with the inevitable diminution of services rendered to the public, the choice is clear—services will be cut back. The consequences to American society of such a decision will be far reaching. We have historically opted to have voluntary non-profit associations assist the government in certain areas. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have an already over-burdened and under-staffed government

assume the difficult and costly responsibility for promulgating and interpreting codes and standards or evaluating and accrediting educational institutions? Clearly, society has in the past been well served by allowing non-profit charitable, educational and scientific organizations to discharge these responsibilities—all through the acts of volunteers.

We do not propose that non-profit organizations be immune from suit. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to encourage volunteers to contribute their services on the one hand while holding such organizations properly accountable for the acts of their volunteers taken on behalf of the organization and in furtherance of its activities. In the second *Coronado Coal* case, this Court in applying what we believe to be the sounder rule, refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly, it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

By transposing the test of "apparent authority" to the area of non-profit charitable organizations which must rely on hundreds of volunteers for their daily activities, the lower court has, in our view, unwisely and inequitably imposed an unnecessary and potentially devastating burden on charitable organizations.

CONCLUSION

For the foregoing reasons, the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

MICHAEL D. BROWN
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Attorney for
The Accreditation Board for Engineering and Technology, Inc.

Of Counsel:

HOWARD B. PRESANT
1370 Avenue of the Americas
New York, New York 10019

Dated: May 22, 1981